STATE OF MICHIGAN

COURT OF APPEALS

RICHARD M. LONSKI and THERESA M. LONSKI,

Plaintiffs-Appellants,

v

HARTFORD FIRE INSURANCE CO, ITT HARTFORD, and HARTFORD INSURANCE CO,

Defendants-Appellees.

UNPUBLISHED
July 22, 2004

No. 247402
Wayne Circuit Court
LC No. 01-101446-NZ

Before: Jansen, P.J., and Meter and Cooper, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's judgment dismissing their claim for no cause of action after the jury returned a verdict in favor of defendants. This case arises out of a claim for insurance proceeds from cement dust damage to plaintiffs' property located at their place of business. We affirm.

Plaintiffs first argue that the trial court committed reversible error when it failed to give plaintiffs' requested special jury instructions, which instructed the jury on the rules of construction when an ambiguity exists in an insurance policy. We disagree. This Court reviews a trial court's decision regarding special jury instructions for an abuse of discretion. *Chastain v General Motors Corp*, 254 Mich App 576, 590; 657 NW2d 804 (2002). "An abuse of discretion is found only in extreme cases in which the result is so palpably and grossly violative of fact and logic that it evidences perversity of will, a defiance of judgment, or the exercise of passion or bias." *Barrett v Kirtland Community College*, 245 Mich App 306, 325; 628 NW2d 63 (2001). Alternatively stated, an abuse of discretion is demonstrated when an unprejudiced person considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made. *Ellsworth v Hotel Corp*, 236 Mich App 185, 188; 600 NW2d 129 (1999).

In denying the plaintiffs' requested special jury instructions, the trial court first had to determine whether the term "cost to repair" in the insurance policy was ambiguous. The trial court held that it was unambiguous. The interpretation of clear contractual language and the determination whether contractual language is ambiguous is a question of law that this Court reviews de novo. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 463, 469; 663 NW2d

447 (2003); *Farm Bureau Mutual Co v Nikkel*, 460 Mich 558, 563; 596 NW2d 915 (1999). "A contract is ambiguous when its words can reasonably be understood in different ways." *Michigan Township Participating Plan v Pavolich*, 232 Mich App 378, 382; 591 NW2d 325 (1998). Even if a contract is inartfully worded or clumsily arranged, if it admits of but one interpretation, it may not be considered ambiguous or fatally unclear. *Id.* "The fact that a policy does not define a relevant term does not render the policy ambiguous." *Morinelli v Perfusion Associates of Michigan, Inc*, 242 Mich App 255, 262; 617 NW2d 777 (2000). Where the policy is clear, this Court is bound by the specific language in the policy. *Michigan Township Participating Plan, supra* at 383.

At issue is the meaning of the term "cost to repair" or "cost of repairing."[1] These terms are found in the "Loss Payment" section of the policy. Plaintiffs assert that the term is reasonably understood to mean either: (1) the reasonable price a party would pay to have property repaired, or (2) the cost actually incurred in repairing property. Although the policy at issue does not define the term, we conclude that in context, the language cannot be reasonably understood to mean the actual cost incurred to repair property.

This conclusion is supported by this Court's holding in *Salesin v State Farm Fire & Casualty Co*, 229 Mich App 346, 354; 581 NW2d 781 (1998). In *Salesin*, this Court had to decide whether the insurer had a right, under a guaranteed replacement cost policy, to deduct a percentage for contractor's profits and overhead, in addition to a percentage for depreciation, when paying the insured the total repair cost of the damaged property. At issue was the meaning to be given to the phrase "repair or replacement costs." *Id.* at 366. The *Salesin* Court relied on and adopted the following rationale from *Gilderman v State Farm Ins Co*, 437 Pa Super 217, 225; 649 A2d 941 (1994): "repair or replacement costs logically and necessarily include *any* costs that an insured reasonably would be expected to incur in repairing or replacing the covered loss." *Salesin, supra* at 366 (emphasis in original).

Similarly, the "cost to repair" and "cost of repairing" language in the present case logically and necessarily includes those costs reasonably likely to be incurred in cleaning up the cement dust. The clear language of the policy presupposes payment prior to the actual repair (or cleanup) of damaged property. This necessarily implies a computation of cost based on reasonable estimates of repair, not a simple summing up of actual costs incurred. Because the term "cost to repair" or "cost of repairing" was not ambiguous, *Salesin, supra* at 366, we conclude that the trial court did not abuse its discretion in denying plaintiffs' requested special jury instructions regarding the interpretation of the terms "cost to repair" and "cost of repairing."

Plaintiffs next argue that the trial court committed reversible error when it refused to admit a tape recording into evidence. Again, we disagree. This Court reviews a trial court's decision to admit or exclude evidence for an abuse of discretion. *Lagalo v Allied Corp*, 233 Mich App 514, 517; 592 NW2d 786 (1999). When reviewing the trial court's evidentiary rulings, this Court considers "the facts on which the trial court acted to determine whether an

[1] We treat these phrases as being synonymous for purposes of this appeal.

unprejudiced person 'would say that there is no justification or excuse for the ruling made.'" *Krohn v Sedwick James of Michigan, Inc*, 244 Mich App 289, 295; 624 NW2d 212 (2001), quoting *Roulston v Tendercare (Michigan), Inc*, 239 Mich App 270, 282; 608 NW2d 525 (2000).

The trial court ruled that plaintiffs failed to lay a proper foundation for the evidence pursuant to MRE 901 and excluded the tape recording. MRE 901(a) provides that "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." "Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording" satisfies the requirements of the rule when proven "by opinion based upon hearing the voice at any time under circumstances connecting it to the alleged speaker." MRE 901(b)(5). Our Supreme Court has stated that under MRE 901, "a tape ordinarily may be authenticated by having a knowledgeable witness identify the voices on the tape. MRE 901 requires no more." *People v Berkey*, 437 Mich 40, 50; 467 NW2d 6 (1991).

We conclude that the trial court did not abuse its discretion in ruling that the evidence was inadmissible because plaintiffs failed to lay a proper foundation for its admission. Although Richard Lonski testified that the person speaking on it was Joe Mara, Lonski never testified that he was familiar with Mara's voice, could recognize Mara's voice, or recognized the voice on the tape as being Mara's. Thus, we find that the necessary testimony to authenticate the tape pursuant to MRE 901 was never elicited. See *Theisen v Detroit Taxicab & Transfer Co*, 200 Mich 136, 140-141; 166 NW 901 (1918).[2] Lonksi's mere assertion that the message was left by Mara does not authenticate the tape. By definition, a trial court cannot abuse its discretion when deciding a close evidentiary question. *Lewis v LeGrow*, 258 Mich App 175, 200; 670 NW2d 675 (2003). At best, this is a close evidentiary question, and we do not find an abuse of discretion.[3]

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[2] In *Theisen* the Court provided:

> It is generally conceded that a person may be recognized and identified by his voice, if the hearer is acquainted with the speaker's voice. Assuming, then, that B is thus acquainted with A's voice, and that voices can sometimes be distinguished on the telephone, and that B did in this instance distinguish A's voice, then B's belief that A was the speaker is founded on sufficient evidence. [*Theisen, supra* at 140-141, quoting Wigmore, Evidence, Vol. 3, § 2155, 1904.]

[3] We note that plaintiffs also argue that the trial court abused its discretion because the pre-trial order listed the Mara tape recording as an exhibit. This argument is without merit because, although pre-trial orders are fundamental in guiding the course of litigation, it is the rules of evidence that govern the admission of evidence. MRE 101; *Waknin v Chamberlain*, 467 Mich 329, 333; 653 NW2d 176 (2002). We further note that plaintiffs contend that the tape recording should have come in under an MRE 804 exception to the hearsay rule because Mara, deceased, is an unavailable witness. This argument also lacks merit as plaintiffs are required to authenticate the evidence in addition to showing that an exception to the hearsay rule applies for the evidence to be properly admitted. *People v Jenkins*, 450 Mich 249, 260; 537 NW2d 828 (1995).

Affirmed.

/s/ Kathleen Jansen
/s/ Patrick M. Meter
/s/ Jessica R. Cooper